

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Mary Merrill Anderson,

Complainant,

vs.

Hauser for 8th Ward Volunteer Committee,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER

The above-entitled matter came on for an evidentiary hearing on October 24, 2005, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Steve M. Mihalchick, and Bruce H. Johnson. The hearing record closed on November 1, 2005, with the filing of the parties' post-hearing briefs.

Maria A. Michlin, Attorney at Law, 845 Jefferson Street, Anoka, MN 55303, appeared on behalf of Mary Merrill Anderson ("Complainant").

Alan W. Weinblatt, Attorney at Law, Weinblatt and Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, appeared on behalf of the Hauser for 8th Ward Volunteer Committee ("Respondent").

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did Respondent violate Minn. Stat. § 211B.06, by preparing and disseminating false campaign material that Respondent knew was false or communicated to others with reckless disregard as to whether it was false?

If so, what remedy, if any, is appropriate?

A majority of the panel concludes that the Complainant has not established a violation of Minn. Stat. § 211B.06, and therefore, the Complaint is dismissed.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. Marie Hauser is a candidate for the Minneapolis City Council, Ward 8. Ms. Hauser is a member of the DFL party but does not have the DFL party's endorsement. Currently, Ms. Hauser is a Minneapolis Park and Recreation Board ("Park Board") Commissioner for District 3. Ms. Hauser has been a Park Board Commissioner since 2002.

2. The other candidates running in the primary election for the 8th Ward Minneapolis City Council seat included Jeffrey Hayden and Elizabeth Glidden. At the Minneapolis DFL endorsing convention in April 2005, none of the candidates for 8th Ward City Council obtained a large enough percentage of the votes to win the DFL endorsement.¹

3. Mary Merrill Anderson is a DFL-endorsed candidate for Commissioner at Large on the Minneapolis Park and Recreation Board. The Minneapolis Park Board is made up of six district commissioners and three at-large commissioners. In addition to her DFL endorsement, Ms. Anderson's candidacy has been endorsed by AFSCME, DFL Feminist Caucus, Stonewall DFL, MAPE and other organizations.²

4. Ms. Anderson is known to voters in the 8th Ward. Although she currently lives in the 7th Ward, Ms. Anderson has lived in the 8th Ward, and she still attends church in the 8th Ward. In addition, Ms. Anderson has worked for the Minneapolis parks system for approximately 25 years. She was the Park Director for Powderhorn Park, which is located in the 8th Ward, and she was the Superintendent of Parks for almost 5 years before retiring in 2003. While she was Superintendent, the Park Board distributed to Minneapolis residents at least annually and sometimes twice a year a publication called "Jump In," which was primarily a guide to the Park Board's summer program. The publication included a photograph of Ms. Anderson. The last issue of "Jump In" that included a picture of Ms. Anderson was distributed in 2003.³

5. Ms. Hauser encouraged Ms. Anderson to run in 2005 for a seat on the Park Board. Ms. Hauser offered to help Ms. Anderson with obtaining labor and other endorsements, and she offered to place one of Ms. Anderson's lawn signs in front of her house on Portland Avenue.⁴

6. Ms. Anderson did not believe she needed any help from Ms. Hauser with respect to her campaign. Ms. Anderson was able to obtain labor endorsements and endorsements from other organizations, as well as the DFL

¹ Testimony of Hayden.

² Testimony of Anderson.

³ Testimony of Anderson.

⁴ Testimony of Anderson and Hauser.

endorsement, without any assistance from Ms. Hauser or Hauser's campaign committee.⁵

7. The Hauser for 8th Ward Volunteer Committee ("Hauser Committee") has a subcommittee that works on campaign material. The members of this subcommittee are Tony Scallon, Steve Jevning and Hugh Newman.⁶

8. Sometime shortly prior to September 10, 2005, the Hauser Committee prepared a campaign flyer to distribute the weekend before the primary election. The campaign flyer was in the form of a two-sided 5.5" x 8.5" card. On the front side of the card were pictures of Ms. Hauser, Mary Merrill Anderson, and Tom Nordyke.⁷ Above the pictures of the candidates' faces was the following statement:

VOTE TUESDAY SEPTEMBER 13TH
for Your 8th Ward Team

On the back side of the card was the same statement running horizontally across the top, with smaller pictures of the candidates arranged underneath in a vertical row. Alongside the pictures were boxes with check marks resembling a ballot. Dan Froehlich, another candidate for Park Board, was also listed although not pictured.⁸

9. The picture of Ms. Anderson that the Hauser Committee used on the campaign flyer was the same picture that Anderson used in her own campaign material and in the "Jump In" publications sent out by the Park Board.⁹

10. The campaign flyer included a disclaimer that stated: "Prepared and paid for by the Hauser for 8th Ward Volunteer Committee Betty Boeck, Treasurer, 3307 Portland Avenue South Minneapolis MN 55407."¹⁰

11. At the time that the campaign flyer was prepared and disseminated, Ms. Hauser and her committee members were aware that Ms. Anderson was not supporting Ms. Hauser's candidacy and that Anderson was publicly supporting Jeff Hayden's candidacy for 8th Ward City Council.¹¹ Mr. Hayden is Ms. Anderson's nephew. Ms. Anderson made public campaign appearances with Mr. Hayden at parades and at other get-out-the-vote events.¹²

⁵ Testimony of Anderson.

⁶ Testimony of Hauser, Scallon and Jevning.

⁷ Like the Complainant, Tom Nordyke is an at large candidate for the Park Board.

⁸ Ex. R-1.

⁹ Testimony of Anderson.

¹⁰ Ex. R-1.

¹¹ Testimony of Hauser and Jevning.

¹² Testimony of Anderson and Hauser.

12. Ms. Hauser does not remember if she gave any consideration to the fact that Ms. Anderson was not supporting her and was supporting another 8th Ward candidate when she reviewed the design of the campaign flyer.¹³

13. It cost the Hauser Committee about \$700 to print 12,000 copies of the campaign flyer.¹⁴

14. The Hauser Committee and volunteers distributed the campaign flyer in Minneapolis Ward 8, Precincts 6, 7, 8, 9 and 10 on September 10, 2005. It was also distributed in about one-half of Precinct 5.¹⁵

15. The Hauser Committee's purpose in drafting the flyer was to put together a list of candidates on a card that resembled a "sample ballot" without using the specific words "sample ballot." The Hauser Committee also wanted to distribute something to voters just before the primary election that would encourage them to vote for Ms. Hauser and identify the Park Board candidates that Hauser supported. The Hauser Committee decided that the word "team" was acceptable as a way of identifying the candidates Ms. Hauser supported.¹⁶

16. At the time the campaign flyer was being drafted, Hauser Committee members were aware that Jeff Hayden, Ms. Hauser's opponent, was Ms. Anderson's nephew, and that Anderson was supporting Hayden's candidacy and not Hauser. Someone on the Hauser Committee asked whether it was "odd" to use Ms. Anderson's name and photograph on the flyer when the Committee knew that Anderson supported Hayden and the response was that the Committee was not asking for Anderson's endorsement but instead was supporting her.¹⁷

17. Ms. Hauser and the Hauser Committee never sought permission from Ms. Anderson or Mr. Nordyke to use their names and pictures on the campaign flyer.¹⁸ Ms. Anderson never gave the Hauser Committee permission to use her name or picture on Hauser's campaign material.¹⁹

18. On the evening of September 10, 2005, Ms. Anderson became aware of Respondent's campaign flyer. Ms. Anderson was surprised and upset by the campaign material because she believed it indicated that she was supporting Ms. Hauser's candidacy for City Council instead of Mr. Hayden's candidacy. Ms. Anderson called Ms. Hauser and told Ms. Hauser that she objected to the distribution of the campaign flyer. Ms. Anderson requested that Ms. Hauser stop distributing the material, that she print a retraction, and that she

¹³ Testimony of Hauser.

¹⁴ Testimony of Hauser.

¹⁵ Testimony of Hauser.

¹⁶ Testimony of Jevning and Scallon.

¹⁷ Testimony of Jevning.

¹⁸ Testimony of Anderson and Hauser; Ex. C-1 (Affidavit of Nordyke).

¹⁹ Testimony of Anderson.

distribute the retraction to the residents of the 8th ward.²⁰ Ms. Anderson reminded Ms. Hauser that she was supporting her nephew, Jeff Hayden, and not Hauser. Ms. Hauser responded, "I know you are not supporting me, but I am supporting you."²¹ Ms. Hauser told Ms. Anderson that her purpose in preparing and distributing the flyer was to inform voters that she was supporting Ms. Anderson and Mr. Nordyke for the Minneapolis Park Board. Ms. Hauser also told Ms. Anderson that she was not sure she could do all of the things Ms. Anderson requested and that she would have to talk to her campaign committee about it.²²

19. Ms. Anderson sent an email to the Spokesman-Recorder newspaper and called KFAI radio station in an attempt to correct the information presented in Ms. Hauser's campaign flyer.²³

20. Ms. Hauser and members of her campaign committee met on the morning of Sunday, September 11, 2005, to discuss Ms. Anderson's concerns regarding the campaign flyer. The Hauser Committee decided not to distribute any more of the flyers.²⁴ However, some members of Ms. Hauser's campaign committee or volunteers continued to distribute the flyers in the 8th Ward area on Sunday, September 11, 2005 and Monday, September 12, 2005.²⁵

21. Some people interpreted the campaign flyer to mean that Ms. Anderson was now supporting Ms. Hauser's candidacy and was no longer supporting Mr. Hayden's candidacy.²⁶

22. Neva Walker is the Minnesota Representative for District 61B. District 61B includes the 8th Ward. Ms. Walker received inquiries from residents of the 8th Ward regarding the campaign flyer. Residents asked Ms. Walker why Ms. Anderson was no longer supporting her nephew and was now supporting Ms. Hauser.²⁷

23. Jeff Hayden finished third behind Ms. Hauser and Elizabeth Glidden in the primary election. Only the top two candidates advance to the general election.²⁸

24. On September 16, 2005, Ms. Anderson filed a complaint with the Office of Administrative Hearings against the Hauser Committee alleging a violation of Minn. Stat. § 211B.02 (false claim of support). By Order dated September 20, 2005, Administrative Law Judge Barbara Neilson dismissed the complaint on the basis that, although the statute prohibits false implications of

²⁰ Testimony of Anderson and Hauser; Ex. C-5.

²¹ Testimony of Hauser.

²² Testimony of Anderson and Hauser.

²³ Testimony of Anderson.

²⁴ Testimony of Hauser.

²⁵ Testimony of Walker, Wherley and Emmott.

²⁶ Testimony of Emmott and Walker.

²⁷ Testimony of Walker.

²⁸ Testimony of Hayden; Ex. C-3.

support by a political party, the statute prohibits only expressly false statements of support by an individual.

25. On October 5, 2005, Ms. Anderson filed a complaint with the Office of Administrative Hearings against Marie Hauser and the Hauser for 8th Ward Volunteer Committee alleging that they violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material.

26. On October 6, 2005, Administrative Law Judge Beverly Jones Heydinger determined that the complaint set forth a prima facie violation of Minn. Stat. § 211B.06.

27. By Order dated October 14, 2005, Judge Heydinger found that there was probable cause to believe that the Respondent violated Minn. Stat. § 211B.02.

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.01, subd. 2, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...” The campaign flyer at issue in this case is campaign material within the meaning of that statute.

3. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

4. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.²⁹

5. The Complainant has failed to show by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06, subd. 1, by preparing and disseminating campaign material that Respondent knew was false or communicated to others with reckless disregard of whether it was false.

²⁹ Minn. Stat. § 211B.32, subd. 4.

Based upon the record herein, and for the reasons stated in the following Memorandum, the majority of the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED that the Complaint in this matter is DISMISSED.

Dated this 4th day of November, 2005.

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

/s/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape-recorded (3 tapes); No transcript prepared.

MEMORANDUM

The weekend before the primary election, the Hauser for 8th Ward Volunteer Committee distributed a campaign flyer it had prepared that stated "VOTE TUESDAY SEPTEMBER 13th for Your 8th Ward Team." Below this statement were pictures of Marie Hauser, Mary Merrill Anderson, and Tom Nordyke. The Hauser Committee designed and distributed the campaign flyer to help elect Marie Hauser as the Minneapolis 8th Ward City Councilmember. Prior to designing and distributing the flyer, the Hauser Committee was aware that Ms. Anderson did not support Ms. Hauser's candidacy and that she instead publicly supported and endorsed the candidacy of her nephew, Jeff Hayden, for 8th Ward Council. Moreover, Ms. Anderson never gave the Hauser Committee permission to use her name or picture.

Complainant maintains that the Hauser Committee violated Minnesota Statute § 211B.06, by falsely stating in this campaign material that Ms. Anderson and Ms. Hauser were part of the same "8th Ward team." Ms. Anderson argues that the phrase "8th Ward team" falsely indicates that she supports and/or is working together with Ms. Hauser. Ms. Anderson has never supported Ms.

Hauser's candidacy, and she argues that she has never worked with Ms. Hauser as part of an "8th Ward Team."

The Respondent argues that the Complaint fails to state any violation of Minn. Stat. § 211B.06, as the flyer truthfully states that Ms. Hauser supported Ms. Anderson's election to the Minneapolis Park Board. According to the Respondent, the fact that the disclaimer at the bottom of the flyer states that it is a Hauser Committee piece confirms the issue of who is supporting whom.

Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect ... [or] promote ... a candidate for election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

The Hauser Committee does not dispute that it prepared and disseminated the campaign flyer at issue. Nor does it dispute that the flyer was intended, at least in part, to elect Ms. Hauser to public office. The Hauser Committee, however, denies that the flyer says anything about the political character or acts of anyone; that it is false; and that it was distributed with either knowledge of falsity or with reckless disregard as to whether it was false.

The Hauser Committee argues that Minn. Stat. § 211B.06, must be interpreted as requiring a specific false statement of fact and not just an allegedly subjective implication. The Respondent contends that because the flyer does not state affirmatively that Ms. Anderson supports Ms. Hauser, the Complainant has not shown a violation of Minn. Stat. § 211B.06. Moreover, the Respondent contends that their use of the word "team" was not false because it was meant to convey Hauser's opinion as to which candidates she could best work with. In other words, the Hauser Committee named the Park Board candidates that Hauser considered would make a good "8th Ward team."

When interpreting the prohibition against false statements in a predecessor statute, the Minnesota Supreme Court observed that the statute was "directed against the evil of making false statements of fact ..."³⁰ A challenged statement's specificity and verifiability, as well as its literary and public context, are factors to be considered when distinguishing between fact and opinion.³¹ The issue presented to the panel is whether the phrase "vote ... for your 8th ward team" is a false statement of fact that can be proven true or false or merely a description of Ms. Hauser's perception or desire that is nonspecific and cannot be deemed "false" in violation of Minn. Stat. § 211B.06.

³⁰ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981) (interpreting Minn. Stat. § 210A.04, predecessor to Minn. Stat. § 211B.06.).

³¹ *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

The majority of the panel concludes that the phrase “vote for your 8th Ward team” is not a false statement of fact because it lacks the specificity that the Minnesota Supreme Court required in the *Diesen* case. It is an ambiguous statement susceptible of more than one meaning and not a statement that can be verified or proven false. Some people might interpret it as Complainant does, that it implies an endorsement. Others might at least as reasonably interpret it to be promoting a team to be elected. Even the meaning of “team” is in the eyes of the beholder. It might mean a group that can work together, it might mean a group that has worked together, it might mean a group that supports each other, it might mean a group that is forced to work together, it might mean a hundred other things. Unless it is clearly and convincingly false, a statement does not violate Minn. Stat. § 211B.06. This is not such a statement, and there is no violation.

Because the majority of the panel finds that the Complainant has not established that the campaign material violates Minn. Stat. § 211B.06, the panel does not need to address Respondent’s remaining arguments. Nor will the panel address Respondent’s motion to dismiss Ms. Hauser as a party due to the omission of her name in the caption of the prima facie and probable cause orders. The Complaint is dismissed in its entirety.

S.M.M. B.H.J.

DISSENT

I respectfully dissent from the legal conclusion reached by the majority that the flyer at issue does not contain a false statement of fact. The flyer, which was intended to and does look like a sample ballot, contains the names and photographs of Marie Hauser, Mary Merrill Anderson, and Tom Nordyke, with a sentence above their photographs reading “VOTE TUESDAY SEPTEMBER 13th for Your 8th Ward Team.” A team is defined as “a group on the same side” or “a group organized to work together.”³² In my view the flyer as a whole is a specific factual statement that Marie Hauser, Mary Merrill Anderson, and Tom Nordyke are candidates acting “on the same side” or are a group of candidates “organized to work together,” and I believe this is how the ordinary voter would read it.

If, as a legal matter, the statement is sufficiently unambiguous to be considered a statement of fact, then the record unquestionably demonstrates by clear and convincing evidence not only that the statement is false but that Hauser and her committee knew it was false and communicated it with reckless disregard of whether it was false. Hauser and members of her committee testified that they were aware when they prepared the flyer that Anderson did not

³² American Heritage Dictionary (4th ed. 2002).

support Hauser,³³ and they knew in addition that Anderson was supporting one of Hauser's opponents in the primary; but they considered it appropriate nonetheless to use Anderson's name and image in the flyer because "[Hauser] supported her." This is a patronizing justification for what the record reflects was a calculated effort to link Hauser with two candidates who were in fact endorsed by the DFL, and with Anderson in particular, because she and her family are well known African Americans in the Eighth Ward.³⁴

Anderson initially filed a complaint alleging that the flyer was a false claim of support, in violation of Minn. Stat. § 211B.02. That complaint was dismissed after a prima facie review, for the similar reason that the flyer only implied that Anderson supported Hauser, but did not expressly state it. I disagree with that conclusion as well. If Hauser had wanted to list Anderson's name, along with the names of hundreds of other supporters, on an invitation to a weeknight fundraiser in someone's home, she would have been required under § 211B.02 to obtain written permission from Anderson to do so. Instead, Hauser used not only Anderson's name but her photographic image, without her consent, in a piece that was intended to influence all voters in the Eighth Ward to vote for Hauser. I would have concluded that the flyer also violated Minn. Stat. § 211B.02.

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

³³ They had no idea whether Tom Nordyke supported Hauser or not, but they used his name and photograph as well.

³⁴ The testimony by a member of Hauser's committee that the committee did not seek permission from Anderson or Nordyke to use their names because, if they had, Anderson and Nordyke would have had to report a portion of the cost as a political contribution, would be more credible if made by an organization independent of a candidate. Candidates for local offices are not permitted to make "independent" expenditures on behalf of each other. See Minn. Stat. § 211A.13.